in those circumstances would not amount to her consent to the eventual rape.

It is also suggested by the accused that the scratches on the complainant's thigh could have been caused by her own fingernails. The defence counsel contends that she had long and sharp finger nails. The accused said that the complainant was covering her private part with her hands while he was inserting his finger into it. This could probably be true and in the event complainant might have inflicted her own injury while defending her chastity at the agonising moment while being molested by the accused.

In my opinion whether this injury was caused by the accused or by the complainant herself during the struggle preceding the rape is of no material importance. The fact remains that there was a mark on her thigh caused during the struggle. It is a corroborative evidence from a source independent of her which tends to show that she did not consent out of her free will. As said by Lord Donovan in *Chiu Nang Hong* v. *Public Prosecutor*: (5)

"The crucial question was whether the complainant consented, and the risk of convicting on her own evidence alone was clear. Some corroborative evidence was most desirable, that is to say, some evidence coming from a source independent of her, which tended to show that she did not consent of her own free will. She did not struggle or shout, she did not try to leave the room, her clothing remained intact, and her body unmarked. She made no complaint until after the lapse of nearly forty hours."

To explain the injuries on the dorsum of his hands the accused brought Tan Ngak Siong (DW1) the proprietor of the shop where he was working. This witness testified that there were no opening of boxes in his shop on June 11, 1974. He further said that he had imported 125 boxes of china-wares on the 6th or 7th of June. These boxes were opened on the same day they arrived. He also said that scratches to the hands sometimes minor and sometimes serious normally caused by metal bands tied around the boxes when opening them. He used to see these types of scratches on accused's both hands before which sometimes lasted for days. This witness however, did not explain how those scratches as found on accused's hands by Dr. Mohd. Salleh Long, were inflicted. These were only a few hours old, still fresh and remained unexplained reasonably.

Accused's wife Chin Kui Goon (DW2) also gave evidence, she stated that accused had never worn an underwear before because of his skin trouble. This probably explains the absence of any reference to his underwear throughout the proceeding which is not now material.

On the whole I find that the accused's story is not consistent and neither does it explain most of the incriminating evidence adduced by the prosecution against him. I am satisfied that the defence does not throw any reasonable doubt on the prosecution's evidence. I found him guilty and after conviction, I sentenced the accused to a period of imprisonment of 18th months which in the circumstances I find appropriate and reasonable.

Order accordingly.

Solicitors: *Shelley Yap & Co.; P. V. Yap & Co.*

KEE KENG MOW v. SETAPAK GARDEN ESTATE LTD.

[O.C.J. (Hashim Yeop A. Sani J.) February 22, 1975]
[Kuala Lumpur — Civil Suit No. 826 of 1971]

Interpretation — Construction of written agreements — Payment of proportion of outgoings — Plain and ordinary meaning.

The plaintiff had agreed by an agreement of sale that he "shall repay to the company such proportion of the total of such outgoings paid by the company in respect of the said land as the area or value of the said lot bears to the total area or value of the said land excluding the areas thereof reserved for roads, open spaces etc." The plaintiff contended that he should not be asked to pay the proportion that relates to the area of land which has been reserved for roads, open spaces, electrical substations and other communal amenities. The defendants claimed on the other hand that the outgoings should be shared between the defendant, the plaintiff and others who purchased lots from the defendant in that area. The plaintiff claimed that he had been made to pay more than his share and asked for repayment.

Held: the construction given by the plaintiff was inconsistent with the plain and ordinary meaning of the words in the agreement and therefore the plantiff's claim must be dismissed.

Cases referred to:-

(1) *Jagathesan* v. *Linggi Plantations Ltd.* [1969] 2 M.L.J. 253, 256.

(2) *Jagathesan* v. *Linggi Plantations Ltd.* [1972] 1 M.L.J. 91 P.C.

(3) *Re Levy, ex parte Walton* (1881) 17 Ch. D. 746.

CIVIL SUIT.

Morris Edgar for the plaintiff.

M. T. Liew for the defendant.

Hashim Yeop A. Sani J.: By an agreement (Exhibit P1) entered into in 1966 between the plaintiff and the defendant (a housing developer) the plaintiff purchased an area of land marked as Lot No. S-25 (hereinafter referred to as the "said lot") in the Setapak Garden Housing Estate as described in map annexed to P1. By virtue of the said agreement the plaintiff, *inter-alia*, agreed to repay to the defendant from a certain date a proportion of the total of certain outgoings as hereinafter described, paid by the defendant in respect of the land. The plaintiff alleges that he had repaid (and the defendant had collected) in excess of the amount as agreed and the defendant has failed or refused to refund the said excess to the plaintiff.

The plaintiff claims for a declaration that the defendant was only entitled to collect quit rent and education rates for the period specified from the plaintiff "only for such amount as the said lot proportionately bears against the whole area excluding areas reserved for roads, open spaces, electrical sub-stations and communal amenities." At the commencement of the hearing the plaintiff left open the amount alleged to be in excess as that would depend on the calculation based on the eventual construction of the agreement to be given by the court.

The defendant denies collecting any sum in excess of the agreement or that the defendant has refused or neglected to repay the said sum alleged to be the excess.

Nothing else in the agreement (P1) seems to be in dispute except the relevant clause relating to such

repayment. This is clause 2 of the agreement which for convenience is reproduced below:—

"2. The Purchaser shall be liable for all outgoings including quit rent rates and assessment in respect of the said Lot as from the 22nd day of February, 1966 and shall repay to the Company such proportion of the total of such outgoings paid by the Company in respect of the said land as the area or value of the said Lot bears to the total area or value of the said land excluding the areas thereof reserved for roads, open spaces and for electrical sub-stations and other communal amenities if any or pay to the Company the actual amount assessed by the Local Authority for the said Lot and shall continue to pay the same until a separate document of title to the said Lot is issued and transferred to the purchaser as hereinafter provided."

That part of clause 2 of the agreement comprising the words "or pay to the company the actual amount assessed by the Local Authority for the said Lot" does not come into play in the present case. It was contended on behalf of the defendant that clauses 4 and 5 of the agreement would also be material. But to my mind clause 4 relates itself back to clause 2 and clause 5 does not go beyond re-stating the rights of the plaintiff which he already had by virtue of the purchase.

By virtue of clause 2 of the agreement the plaintiff is "liable for all outgoings including quit rent rates and assessment" in respect of the said lot. This is clearly set out as the first limb of the clause. The second limb of the clause also stipulates that the plaintiff "shall repay to the company such *proportion* of the total of such outgoings paid by the company in respect of the said land as the *area or value* of the said Lot *bears to the total area or value* of the said land *excluding* the areas thereof reserved for roads etc." The words in italics would seem to be the source of the conflict.

In *Jagathesan* v. *Linggi Plantations Ltd.*[1] Ong C.J. re-states a cardinal principle of construction of a written agreement as follows: —

"The cardinal rule of construction of the terms of a written agreement is to discover therefrom the intention of the parties to such agreement. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent." (See *Ford* v. *Beech* [(1848) 11 Q.B. 852, 856] *per* Parke B.)

When this case came before the Privy Council, their Lordships reaffirmed the approach of the learned Chief Justice in the matter of construing a written agreement.[2]

In the instant case, it is admitted that the total area of the land is 26 acres, 0 rood, 15 poles which is equivalent to 1,136,643.75 sq. ft. and that the area reserved for roads, open spaces, sewerage plant and electrical sub-station totalled 488,766.75 sq. ft. The area of the plaintiff's lot is 1,600 sq. ft. The total amount of quit rent and education rate paid by the defendant for the said land during the material period of 1966 and 1967 was $23,020.80. From the plaintiff the defendant had collected for the material period a sum of $109.02. According to the plaintiff's statement of claim the actual amount which was to be payable by the plaintiff to the defendant in respect of quit rent and education rates was $62.10 only and therefore the defendant had over collected from the plaintiff an excess of $46.92. However, at the commencement of hearing the plaintiff left open the actual amount of excess for the court to determine based on the construction of clause 2 of the agreement.

In the statement of defence the defendant explains how the sum of $109.02 was arrived at. According to the defendant this sum was arrived at by calculating the said proportion of quit rent and education rate for 23 months calculated at $4.74 per month arriving therefore at the figure of $109.02. The proportion arrived at by the defendant is set out in paragraph 3 of the statement of defence in the form of a mathematical formula which can be described as follows, namely, the area of the plaintiff's lot *upon* the total area of the said land after excluding areas reserved for roads, open spaces etc. *multiplied* by the total sum payable in respect of the whole land for the years 1966 and 1967. It is however the contention of the plaintiff that the formula used by the defendant does not conform to the terms of clause 2 of the agreement.

It is not in dispute however that the actual total outgoings paid by the defendant was $23,020.80 for the material period. Neither is the area of the plaintiff's lot or the total area of the land in question or the area reserved for roads etc. What is in dispute is the interpretation given to the words "such proportion" of total outgoings ($23,020.80) as the "area" of the plaintiff's lot (1,600 sq. ft.) "bears to the total area of the said land excluding the areas reserved for roads etc."

According to Oxford English Dictionary, Volume VIII, the word "proportion" means "to adjust in proper proportion to something else as to size, quantity, number etc; to make proportionate."

Reading clause 2 of the agreement with an open mind I fail to see any ambiguity as to the intention of the parties. The words "shall repay . . . such proportion of the total of such outgoings . . . in respect of the said land as the area of the said (lot) bears to the total (area) of the said land excluding the areas thereof reserved for roads etc." cannot be made any clearer by any other words or phrases. The words used are ordinary words and their plain and ordinary meaning should be adopted. Jessel M.R. in *Re Levy exp. Walton*[3] said of the principle used in such construction that the grammatical and ordinary sense of the words should be adhered to, unless that would lead to some absurdity.

The crux of the whole thing seems to me to be this. The defendant seems to propose a construction for clause 2 of the agreement conveying the concept of sharing of the outgoings between the defendant, the plaintiff and others who purchased lots from the defendant in that area. On the other hand it seems to me that the contention of the plaintiff is simply that he should not be asked to pay more than the actual proportion of his land as bears to the total area of the said land *without* calculating those areas reserved for roads, open spaces, electrical sub-stations and other communal amenities and that this sum will eventually be replaced by the actual amount assessed by the Local

Authority for each lot. According to the plaintiff therefore he should not be asked to pay the proportion that relates to the area of the land which has been reserved for roads, open spaces, electrical substations and other communal amenities.

Two other concepts would also seem to be employed in the formula for repayment in clause 2 of the agreement and these are the concept of "area" and the concept of "value". It is clear that the concept of area has been used by the parties here instead of value simply because the new lots have not yet been assessed separately by the Local Authority for otherwise plaintiff would have been liable under the agreement to pay only the actual amount assessed by the Local Authority. The concept of "value" was not employed in the formula in question but it is relevant for consideration. In my view, the construction given by the plaintiff to clause 2 of the agreement is not only inconsistent with the words in that clause but also isolates the value of his lot from the value of total area of the housing estate including such areas of the estate as have been developed for roads and other public amenities. The roads and open spaces and public and communal amenities in that area must eventually affect the value of the plaintiff's land.

For the above reasons the plaintiff's claim is dismissed with costs.

Claim dismissed.

Solicitors: *Morris Edgar & Co.; Chung & Huang.*

CREDIT CORPORATION (M) BHD. v. NATIONAL INSURANCE CO. LTD.

[O.C.J. (Chang Min Tat J.) February 28, 1975]
[Kuala Lumpur — Originating Summons No. 508 of 1973]

Arbitration — Application for order for costs — R.S.C., 1957, O.28 r.11 — Inherent jurisdiction of court.

In an arbitration under an order of court, the applicant's solicitors omitted to ask for an order for costs. The applicant then applied to the court for the order. It was contended by the respondent that the applicant was not entitled to make the application under Order 28 rule 11 and the proper course was for it to sue its solicitors for negligence.

Held: (1) the omission of the applicant's solicitors was not in a strict sense a case of clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission;

(2) there is power under the inherent jurisdiction of the court where the order has not been drawn up and entered or under the liberty to apply implied in the order or by virtue of Order 28 rule 11 of the R.S.C. to grant the order sought.

Cases referred to:-

(1) *Re Harrison's Share* [1955] Ch. 260; [1955] 1 All E.R. 185.
(2) *Fritz* v. *Hobson* (1880) 14 Ch.D. 542.
(3) *Penrice* v. *Williams* (1883) 23 Ch.D. 353.
(4) *In re Inchcape* [1942] Ch.D. 394.
(5) *Tong Lee Wah & Anor.* v. *Chin Ah Kwi & Ors.* [1971] 2 M.L.J. 75.
(6) *Cristel* v. *Cristel* [1951] 2 All E.R. 574.

ORIGINATING SUMMONS.

Miss Cheng Kah Leng for the applicant.

R. K. Nathan for the respondents.

Chang Min Tat J.: The costs of an application by Originating Summons for the appointment by the court of an arbitrator under the Arbitration Act 1952 cannot be very much and yet they constitute the subject matter of this further application before me. It became necessary only because at the hearing of the original application the applicant who was also the applicant herein obtained an order by consent but omitted to ask for an order for costs. It now asks for a further order for the costs of the application.

The facts briefly are as follows: The applicant was the hirer of a motor car which was let on hire purchase to one Chin Ah Fong. The car was insured with the respondent under a comprehensive policy of insurance which by its terms rendered the respondent liable to make good for the loss of the car even if the loss was sustained or occasioned by the hirer. The hirer reported the car stolen as far back as September 3, 1971, and a claim was lodged with the respondent. On July 20, 1973, the applicant's solicitors wrote to the respondent requiring the respondent under the terms of the insurance to nominate an arbitrator within one month of the receipt of the letter. The respondent did not reply thereto. The applicant's solicitors on October 20, 1973, wrote further to the respondent suggesting the name of Mr. Khoo Eng Chin an advocate and solicitor as an arbitrator and gave the respondent 21 days to concur or to disagree. The respondent again failed to reply. Consequent on the failure to evoke any response from the respondent, the applicant took out the originating summons on December 19, 1973, asking the court to appoint the arbitrator under section 12 of the Arbitration Act. Mr. Khoo Eng Chin was again suggested. In the originating summons the applicant failed to include a prayer for costs or the omnibus prayer for such further or other order which might have covered an omission of such a nature. When the case came up before my brother Pawan Ahmad J. a consent order was obtained for the appointment. There were consequently no arguments before the learned judge. Before that, the applicant's solicitors had written giving the respondent the usual 48 hours' notice and advising that if they were forced to apply to the court they would also apply for the costs of the application to be paid by it.

Having obtained the order the applicant noticed its omission or failure to ask for costs and immediately communicated with the respondent's solicitors to seek their agreement for such costs. The respondent failed to agree and this application is now made to the court.

From the correspondence that passed between the parties and which was exhibited in the several affidavits filed it is clear that the reason for the first application to court was the failure of the respondent to reply. The respondent also made some vague allegations of conducting investigations into the theft but the investigations did not seem to have gone very far in the course of the two years.